ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	
IMPLEMENTATION OF SECTION 402(b)(1)(A) OF THE TELECOMMUNICATIONS ACT OF 1996	CC Docket No. 96-187

COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS
RESELLERS ASSOCIATION

Charles C. Hunter
Catherine M. Hannan
HUNTER COMMUNICATIONS LAW GROUP
1620 I Street, N.W.
Suite 701
Washington, D.C. 20006
(202) 293-2500

Its Attorneys

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SUMMARY

The Telecommunications Resellers Association ("TRA"), an organization consisting of more than 500 entities engaged in, or providing products or services in support of, telecommunications resale, endorses, and urges the Commission to grant, the Petitions for Reconsideration filed by AT&T and MCI, and opposes similar relief sought by SWBT. To this end, TRA proffers the following recommendation:

- By reading the phrase "deemed lawful" in Section 204(a)(3) to establish a conclusive presumption of reasonableness for LEC rates, terms and conditions filed on a streamlined basis, the Commission has turned a potentially pro-competitive statutory provision into a consumer's nightmare. Applying the rule of statutory construction that a provision should not be read to produce unjust or absurd results, the Commission should interpret Section 204(a)3) to create a rebuttable presumption of lawfulness. Such a reading is consistent with the manifest purpose of the telephony provisions of the 1996 Act.

- The Commission should ensure that interested parties have adequate time to analyze LEC tariffs filed on a streamlined basis by safeguarding against filing gamesmanship.

- As recommended by MCI, LECs should "not be permitted to file cost support under confidential cover until a demonstrated level of competition has been achieved."

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The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.429(f) of the Commission's Rules, 47 C.F.R. § 1.429(f), hereby responds to petitions for reconsideration[1] of the Report and Order, FCC 97-23, released by the Commission in the captioned docket on January 31, 1997 (the "Report and Order").[2] In the Report and Order, the Commission promulgated regulations implementing the streamlined local exchange carrier ("LEC") tariffing requirements embodied in Section 204(a) of the Communications Act of 1934 ("Communications Act"),[3] as amended by Section 402(b)(1)(A)(iii) of the Telecommunications Act of 1996 ("1996 Act").[4]

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[1] Petitions for Reconsideration have been filed by the AT&T Corp. ("AT&T"), MCI Telecommunications Corporation ("MCI"), and Southwestern Bell Telephone Company ("SWBT").

[2] Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996 (Report and Order), 12 FCC Rcd. 2170 (1997) ("Report and Order").

[3] 47 U.S.C. § 204(a).

[4] Pub. L. No. 104-104, 110 Stat. 56, § 402(b)(1)(A)(iii) (1996).

I.

INTRODUCTION

A national trade association, TRA represents more than 500 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of domestic interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now actively reselling international, wireless, enhanced and internet services. TRA's resale carrier members are also among the many new market entrants that are, or will soon be, offering local exchange and/or exchange access services, generally through traditional "total service" resale of incumbent local exchange carrier ("LEC") or competitive LEC retail service offerings or by recombining unbundled network elements obtained from incumbent LECs, often with their own switching facilities, to create "virtual local exchange networks."

TRA's interest in this proceeding is in protecting the interests of its resale carrier members both as customers and competitors of incumbent and competitive LECs. As inter-exchange carriers ("IXCs"), TRA's resale carrier members are reliant upon LECs for originating and terminating exchange access. As wireless service providers, TRA's resale carrier members are reliant upon LECs for network interconnection. And as CLECs, TRA's resale carrier members are reliant upon LECs for wholesale services, access to unbundled network elements and network interconnection. Of course as CLECs, TRA's resale carrier members are currently

subject to the LEC streamlined tariffing rules adopted by the Commission in the Report and Order.

In furtherance of the interests of its resale carrier members, TRA, in commenting upon the rules and policies proposed in the Notice of Proposed Rulemaking ("Notice"), urged the Commission to:[5]

- Read the Section 204(a)(3) mandate that any "new or revised charge, classification, regulation, or practice" filed by an LEC "on a streamlined basis" shall be "deemed lawful" to create only a rebuttable presumption of lawfulness.
- Retain the ability to defer LEC tariffs under Section 203(b)(2).
- Apply Section 204(a)(3) to new or revised charges associated with existing services, but not to charges associated with new services.
- Allow LECs to specify longer tariff longer notice periods by waiving their right to streamlined processing of tariff revisions.
- Exercise forbearance authority with respect to LEC tariffing requirements judiciously and with great caution given the very substantial market power that ILECs currently possess and will likely retain for the foreseeable future.
- Provide for the electronic filing of tariffs through a carrier administered electronic tariff filing system.
- Retain pre-effective review of tariffs as a means of identifying unjust and unreasonable tariff revisions while continuing to rely as well on post-effective tariff review.
- Adopt tariff filing procedures that require LECs to submit detailed descriptions, impact analyses and legal justifications and that provide for immediate notice to interested parties, and establish certain presumptions of unlawfulness (which should include tariff provisions which restrict or have the effect of restricting resale).

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[5] Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996 (Notice of Proposed Rulemaking), CC Docket No. 96-187, FCC 96-367, 11 FCC Rcd. 11233 (Sept. 6, 1996) ("Notice").

- Establish procedures for expedited review of LEC tariffs which provide meaningful opportunities for public participation.

The Commission rejected TRA's views in a number of key respects, concluding, for example, that tariffs filed under the 1996 Act's streamlined provisions cannot be deferred, and once effective, must be afforded a conclusive presumption of lawfulness. The Commission also concluded that all LEC tariffs would be eligible for streamlining, although they could be filed pursuant to general tariff filing requirements at the LEC's option, and would need to be accompanied only by limited descriptive information. The Commission agreed with TRA only with respect to the retention of pre-effective tariff review, including provision for continued public participation therein, and the adoption of selected procedures to facilitate tariff analysis by the Commission staff and interested parties within the limited time permitted by Section 204(a)(3) for pre-effective tariff review.

AT&T and MCI urge the Commission to reconsider a number of the most anticompetitive and anti-consumer elements of the Report and Order, emphasizing in particular the Commission's misreading of the phrase "deemed lawful" to constitute a license for LECs to subject consumers to unjust or unreasonable rates, terms and conditions without fear of refund obligations. AT&T and MCI also seek reconsideration of a number of rulings which hinder effective review of LEC tariffs by the Commission staff and interested parties. In contrast, SWBT argues for further relaxation of the already excessive streamlining of the LEC tariff filing requirements, seeking, among other things, to deny consumers the right to obtain prospective relief from unjust and unreasonable rates through the complaint process and to further hinder the ability of interested parties to analyze LEC tariff filings. TRA endorses the AT&T and MCI Petitions and adamantly opposes the SWBT Petition.

II

ARGUMENT

A. The Commission Should Reconsider Its Reading of "Deemed Lawful"

AT&T and MCI urge the Commission to reconsider the Report and Order's reading of the Section 204(a)(3) mandate that any "new or revised charge, classification, regulation, or practice" filed by an LEC "on a streamlined basis" shall be "deemed lawful and shall be effective 7 days . . . or 15 days . . . after the date on which it is filed with the Commission . . ." The Commission interprets this provision to establish a "conclusive presumption of reasonableness."[6] The Commission acknowledges that its interpretation "will change significantly the legal consequences of allowing tariffs filed under this provision to become effective without suspension," noting that "tariff filings that take effect, without suspension, under section 204(a)(3) that are subsequently determined to be unlawful in a section 205 investigation or a section 208 complaint proceeding would not subject the filing carrier to liability for damages for services provided prior to the determination of unlawfulness."[7] According to the Commission, however, "this interpretation is compelled by the language of the statute viewed in light of relevant appellate decisions" and reflects "the balance between consumers and carriers that Congress struck when it required eligible streamlined tariffs to be deemed lawful."[8] TRA agrees with AT&T and MCI that the Commission's reading of Section 204(a)(3) is neither compelled nor consistent with the intent of the 1996 Act.

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[6] Report and Order, FCC 97-23 at ¶ 19.

[7] Id.

[8] Id. at ¶¶ 18, 19.

Initially, as AT&T points out, the Commission has acknowledged that the phrase "deemed lawful" is susceptible to at least two readings.[9] And given this ambiguity, the Commission, as MCI argues, "is obligated to follow the rules of statutory construction applied to ambiguous language and interpret this provision in light of its context within the statutory structure and legislative history."[10] Several precepts of statutory construction are pertinent in this regard. First, "ambiguous provisions of a statute should be construed with reference to the statute's manifest purpose."[11] Moreover, when the meaning of a word in a statute is not clear from the language of the statute itself, there must be "recourse to all aids available in the process of construction, to history and analogy and practice as well as to the dictionary."[12] And finally, "a construction of a statute leading to unjust or absurd consequences should be avoided."[13]

It is indisputable that the primary purpose of the telephony provisions of the 1996 Act is to benefit consumers by "opening all telecommunications markets to competition."[14] As described in the Joint Explanatory Statement, the telephony provision at issue here -- *i.e.,* Section 204(a)(3) -- was included in the 1996 Act for the limited purpose of "streamlin[ing] the procedures for revision by local exchange carriers of charges, classifications and practices under

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[9] AT&T Petition at 2; Notice, FCC 96-367 at ¶¶ 8 - 14.

[10] MCI Petition at 2.

[11] Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 408 (D.C.Cir. 1976); *see, e.g.,* United States v. Article of Drug . . . Bacto-Uni-disk . . ., 394 U.S. 784, 799 (1969); National Petroleum Refiners Ass'n v. F.T.C., 482 F.2d 672, 689 (D.C.Cir. 1973).

[12] United Shoe Workers of America, AFL-CIO v. Bedell, 506 F.2d 174 (D.C.Cir. 1974).

[13] Quinn v. Butz, 510 F.2d 743, 753 (D.C.Cir. 1975); *see, e.g.,* Hecht v. Pro-Football, Inc., 444 F.2d 931, 944 (D.C.Cir. 1971), *cert. denied* 404 U.S. 1047 (1972).

[14] Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2nd Sess., p. 113 (1996) ("Joint Explanatory Statement").

section 204 of the Communications Act."[15] Reading Section 204(a)(3) to establish a conclusive presumption of reasonableness for LEC rates and charges, as well as other terms and conditions of service, not only flies in the face of the pro-consumer theme struck by the Congress in the 1996 Act, but inexplicably expands the scope of an otherwise limited provision to produce results which are both unjust and absurd.

As TRA argued in its comments, and as AT&T and MCI emphasize in their Petitions,[16] the Commission's reading of Section 204(a)(3) transforms into a consumer's nightmare a provision designed merely to simplify and expedite review of LEC tariff filings. According to the Commission, the Congress, as part of a consumer-oriented statute, meant to deprive consumers of the decades-old right to seek redress from unjust and unreasonable rates and be made whole through carrier refunds. According to the Commission, the same Congress that revamped the telecommunications regulatory environment to bring to consumers the benefits of a fully competitive telecommunications market intended to provide monopoly-based LECs free license to exact unjust and unreasonable rates by insulating them from all potential refund obligations. And that same Congress, according to the Commission, perpetrated this assault on the rights of consumers without acknowledging the dramatic policy shift.

The absurdity of these conclusions is self evident. Consumers are punished if the Commission allows an unjust or unreasonable LEC rate, term or condition to slip by within a highly-compressed tariff review structure which virtually guarantees frequent occurrence of just such an eventuality. LECs that are ultimately found to have overcharged consumers by levying

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[15] Id. at 186.

[16] AT&T Petition at 1 - 15; MCI Petition at 1 - 10.

unjust and unreasonable rates are permitted to retain their ill-gotten gains and the consumers that have paid these excessive charges are simply left out-of-pocket. Rendering this situation all the more absurd is, as pointed out by both AT&T and MCI, the limited applicability of this refund protection to the single class of carriers that retains the greatest market power.[17] Interexchange carriers ("IXCs") that operate in a highly competitive market, for example, are not immune from customer recovery of overcharges attributable to assessment of unjust and unreasonable rates, while Bell Operating Companies ("BOCs") that "currently are the dominant providers of local exchange and exchange access services in their in-region states, accounting for approximately 99.1 percent of the local service revenues in those markets,"[18] are so protected.

This irrationality is easily cured by employing the alternate reading of Section 204(a)(3) proposed in the Notice. As described in the Notice, the alternate reading of "deemed lawful" would "establish higher burdens for suspensions and investigation," but would not "change the status of tariffs that become effective without suspension and investigation."[19] This interpretation would fulfill the Congressional intent of speeding the effectiveness of LEC tariff revisions, lowering the hurdles an LEC must overcome to implement proposed changes in its rates and terms and conditions of service both by reducing notice periods and shifting to some degree the burden of proof onto those who oppose LEC tariff revisions, without adversely

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[17] AT&T Petition at 9; MCI Petition at 4 - 6.

[18] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended (Report and Order), 12 FCC Rcd. 2297, ¶ 10 (released Dec. 24, 1996), *pet. for rev. pending sub. nom* Bell Atl. Tel. Cos. v. FCC, Case No. 97-1067 (D.C.Cir. filed Jan. 31, 1997), *pet. for recon. pending* (footnote omitted).

[19] Notice, FCC 96-367 at ¶ 12.

impacting consumers. Under this reading, Section 204(a)(3) would emerge as a pro-competitive, pro-consumer action, striking a rational "balance between consumers and carriers."

Such a reading of "deemed lawful," however, would create a rebuttable, rather than a conclusive, presumption of lawfulness. And the Commission has expressed concern that judicial interpretations of the phrase "deemed lawful" preclude such a reading.[20] AT&T has aptly demonstrated, however, that the appellate decisions which the Commission identifies as giving rise to this concern simply do not compel the Commission's reading of Section 204(a)(3). As AT&T explains, "the decisions the Order cites stand for nothing more than the proposition that 'deem' is a term that 'generally' indicates a conclusive presumption; they nowhere suggest that term is a talisman which presumptively operates to rework longstanding tariffing law."[21] Moreover, both AT&T and MCI cite "abundant authority expressly holding that 'deem' can establish a rebuttable presumption."[22]

Moreover, as SWBT confirms, the Commission's application of its reading of "deemed lawful" is inconsistent with that very interpretation. As SWBT points out, "[i]f a tariff is conclusively presumed to be reasonable, a complainant cannot ever meet its burden of proof to show that the tariff rate is 'in contravention to the provisions [of the Communications Act]."[23] Accordingly, the Commission must either read "deemed lawful" to create a rebuttable presumption or extend its draconian ruling and deny consumers prospective, as well as

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[20] Report and Order, FCC 97-23 at ¶ 19.

[21] AT&T Petition at 2 - 6.

[22] AT&T Petition at 6 - 7; MCI Petition at 4.

[23] SWBT Petition at 1 - 3.

retroactive, relief. SWBT advocates the latter course; the better answer, in TRA's view, is the former.

TRA urges the Commission to be guided by the appellate courts in implementing what the Commission apparently believes to be the "plain meaning" of the phrase "deemed lawful" as used in Section 204(a)(3). When following the plain meaning of a statutory provision leads to "absurd or futile results," . . . look[] beyond the words to the purpose of the act."[24] And, "even when the plain meaning [does] not produce absurd results but merely . . . unreasonable one[s] 'plainly at variance with the policy of the legislation as a whole' . . . follow[] that purpose, rather than the literal words."[25] Here, the statutory purpose and the legislative history, not to mention half a century of practice, compel reconsideration.

B. Interested Parties Should be Afforded Adequate Time to Prepare Oppositions to Tariff Filings

AT&T points out in its Petition that by limiting interested parties to three calendar days to file oppositions to LEC tariffs, the Commission virtually ensures that all such tariff filings will be made late Friday afternoon, leaving one business day for interested parties to draft oppositions.[26] As AT&T notes, the Commission concluded that a single business day represented an "unreasonably abbreviate[d] . . . amount of time."[27] To remedy this problem, AT&T recommends the imposition of a requirement that the three calendar days allotted to interested parties to prepare tariff oppositions must include at least two business days. TRA agrees, but

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[24] ECEE, Inc. v. FERC, 611 F.2d 554, 564 (5th Cir. 1980).

[25] Id.

[26] AT&T Petition at 10 - 11.

[27] Report and Order, FCC 97-23 at ¶ 78.

suggests that a preferable approach might be to specify one or more days in a week -- *i.e.*, Monday and/or Tuesday -- upon which LEC tariffs must be filed.

In a related matter, AT&T argues that rate-of-return LECs, like price cap LECs, should be required to file their tariff review plans ("TRPs") 90 days prior to their annual access tariff filings.[28] TRA agrees. There is no basis for distinguishing between rate-of-return and price cap LECs with respect to the TRP analysis that must be undertaken by interested parties opposing annual access tariff filings; in either case, "90 days would be inadequate to allow interested parties to review these filings carefully."[29]

As suggested by both AT&T and MCI, this same argument applies with equal force to mid-term tariff filings that require modification of a carrier's price cap index ("PCI").[30] To paraphrase the Commission, "in view of the volume and complexity of the information submitted . . . any notice period less than 90 days would be inadequate to allow interested parties to review these filings carefully."[31]

C. The Commission Should Ensure that Confidentiality Protections are Not Abused

SWBT faults the Report and Order for "unjustly restricting SWBT's rights to protect confidential information."[32] SWBT complains that it would be effectively precluded from

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[28] AT&T Petition at 12 - 13. SWBT's suggestion that TRPs should be filed at the same time as annual access tariff filings can be rejected out-of-hand. SWBT Petition at 4 - 6. Streamlined treatment of such cost support would ensure no meaningful review of annual access tariffs.

[29] Report and Order, FCC 97-23 at ¶ 102.

[30] AT&T Petition at 13 - 14; MCI Petition at 20 - 21.

[31] Report and Order, FCC 97-23 at ¶ 102.

[32] SWBT Petition at 3 - 4.

the use of streamlined procedures in any case in which it could not disclose the required confidential information.[33]

As MCI notes in its Petition, "the Commission's established practice is to require public filing of cost support for tariffs."[34] Certainly, carrier claims of confidentiality should not be permitted to interfere with the right of the public to comment on LEC tariff revisions. Thus, TRA suggested in its earlier-filed comments that LECs which seek confidential treatment of tariff support material should be required to forego streamlined processing of the associated tariff revisions. While, the Commission did not endorse this view, it did adopt procedures which it believed would "serve the dual purpose of permitting limited access to important information by interested persons while protecting proprietary information from public disclosure."[35]

TRA agrees with MCI that the confidentiality procedures so adopted in the Report and Order are far too generous.[36] TRA also endorses MCI's proposal that "a LEC should not be permitted to file cost support under confidential cover until it has met Section 271(d)(3) requirements, in the case of a Bell Operating Company, or an equivalent competitive test, for other incumbent LECs."[37] In short, "a LEC should not be permitted to file cost support under confidential cover until a demonstrated level of competition has been achieved."[38] TRA also

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[33] Id.

[34] MCI Petition at 16.

[35] Report and Order, FCC 97-23 at ¶ 91.

[36] MCI Petition at 15 - 18.

[37] Id. at 17 - 18.

[38] Id. at 17.

agrees with MCI that use of "standing protective agreements" would facilitate review of tariff revisions for which confidentiality is asserted for cost support.[39]

Certainly, SWBT's suggestion that additional protection of data claimed by an LEC to be confidential is required should be rejected.

III.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to grant the petitions for reconsideration of its Report and Order filed by AT&T and MCI and deny the petition submitted by SWBT.

Respectfully submitted,

TELECOMMUNICATIONS RESELLERS ASSOCIATION

By: _____

Charles C. Hunter
Catherine M. Hannan
HUNTER COMMUNICATIONS LAW GROUP
1620 I Street, N.W.
Suite 701
Washington, D.C. 20006
(202) 293-2500

April 10, 1997

Its Attorneys

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[39] Id. at 18 - 19.

CERTIFICATE OF SERVICE

I, Jeannine Greene Massey, hereby certify that copies of the foregoing document were mailed this 10th day of April, 1997, by United Parcel Service , postage prepaid, to the following:

Frank W. Krogh
Alan Buzacott
MCI Telecommunications Corp.
1801Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Mark C. Rosenblum
Peter H. Jacoby
James H. Bolin, Jr.
AT&T Corp.
295 North maple Avenue
Room 3250J1
Basking Ridge, NJ 07920

Robert M. Lynch
Durward D. Dupre
Thomas A. Pajda
J. Paul Walters, Jr.
Southwestern Bell Telephone Co.
One Bell Center, Room 3520
St. Louis, Missouri 63101

International Transcription Services
2100 M Street, N.W.
Suite 140
Washington, D.C. 20037

Jeannine Greene Massey